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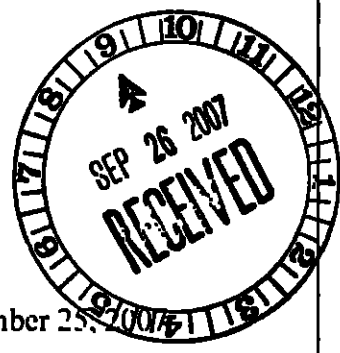

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VIA FEDEX

Hon Vernon A Williams, Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20024

Re. Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order Finance Docket No. 35057/Supplement to Response to Motion for Protective Order

Dear Secretary Williams:

This letter is written on behalf of petitioners Town of Babylon (the "Town") and Pinelawn Cemetery ("Pinelawn") (the Town and Pinelawn are together referred to as "Petitioners") to bring to the Board's attention a recent Third Circuit decision which was rendered after we submitted our opposition to the motion of the New York and Atlantic Railway Co ("NYAR") and Coastal Distribution LLC ("Coastal") for a protective order. Since Petitioners believe that the decision is relevant to the motion, we respectfully submit that the Board consider it in ruling on the motion

On September 4, 2007, the Third Circuit handed down its decision in New York Susquehanna & W Ry Corp v. Jackson, 2007 U.S. App. LEXIS 21083 (3d Cir Sept. 4, 2007) – another case which, like this one, involves the operation of a waste facility on railroad property Among other things, the State had argued in Jackson that, under Hi Tech Trans., LLC v New Jersey, 382 F 3d 295 (3d Cir. 2004), several waste facilities were not subject to preemption under the Interstate Commerce Commission Termination Act ("ICCTA") because the facilities were not operated by a rail carrier. In rejecting this argument, the court in Jackson held that "[t]his case is different [from Hi Tech] because (1) the rail carrier owned (or leased) the land and built the transloading facilities, (2) shippers pay the carrier to load their freight, and (3) the rail carrier does not disclaim liability for the loading process" Id. 2007 U.S. App. LEXIS 21083, at *24 (emphasis added) The court added (2007 U.S. App. LEXIS 21083, at *26)

> Susquehanna, by contracting directly with the shipper, assumed more liability than the Hi Tech rail carrier. Susquehanna could be

> sued for breach of contract (or potentially negligence or some other tort) if something went wrong: the Hi Tech railroad could not, as it was not a party to the shippers' and loaders' agreements We regard this as a substantive difference between the Hi Tech case and this one . . . .

The discovery Petitioners seek is designed to confirm that the relationship between NYAR and Coastal is like the relationship between the railroad and the transloader in Hi Tech (which was not subject to preemption), and is not like the relationship in Jackson (which was subject to preemption – even though the transloader may still have been required to comply with certain state and local regulations). To this end, Petitioners have asked NYAR and Coastal to produce the following:

> 6. All documents concerning the cost of building the Structure at the Facility, including but not limited to architectural and other professional fees, the cost of construction materials, and construction costs
>
> 7. All documents concerning the payment of the cost of constructing the Structure at the Facility.
>
> 8 All documents concerning the cost of maintaining and operating the Facility.
>
> 20. All documents constituting or reflecting contracts between Coastal and Coastal's customers for the shipment of commodities to or from the Facility
>
> 21. All documents concerning payments made by or due from Coastal to NYAR in connection with the Facility.
>
> 49. All documents concerning insurance for the Facility
>
> 50. All documents concerning claims for personal injury or property damage where the injury or damage was alleged to have occurred at the Facility.
>
> 51. All documents concerning disputes with customers of Coastal or NYAR arising from or relating to the use or operation of the Facility, including but not limited to claims asserted by customers against Coastal or NYAR.

These documents will enable Petitioners to prove that, like Hi Tech and unlike Jackson, NYAR did not build the facility, is not paid by shippers to load their freight, and disclaims liability for the loading process As such, NYAR is not operating the facility through Coastal. Rather, Coastal – a non-rail carrier – is operating the facility independently and for its own benefit.

Jackson also makes clear that NYAR and Coastal are mistaken in claiming that, by calling Coastal NYAR's "contract operator" or "agent" in the Operations Agreement, they have foreclosed inquiry into the actual nature of their relationship. Thus, the court wrote in Jackson that "railroads and loaders may not change by contract what in practice is a substantively different relationship." Id., 2007 U.S App LEXIS 21083, at *25 (emphasis added). Petitioners are therefore entitled to the discovery they seek which will enable them to show that, no matter what the self-serving written agreement between NYAR and Coastal recites, Coastal is not, in practice, NYAR's agent

There is one other respect in which Jackson is relevant to this matter It holds that state and local governments are not pre-empted from enforcing health and safety regulations which do not discriminate against railroads and are not burdensome. As an example of the type of state or local regulation with which a railroad can be required to comply, the court in Jackson cited a regulation requiring that storage activities occur within the confines of an enclosed building. Id., 2007 U S. App. LEXIS 21083, at *45. Coastal's facility is not enclosed, and one of the local laws with which the Town wants Coastal to comply requires that facilities like Coastal's be enclosed. Babylon Town Code § Section 213-281(F). For more than three years, Coastal's facility has been operated without oversight by any governmental authority, including the Board To show that Coastal's operation exposes the public to health, safety, and environmental risks, which are subject to state and local regulation, Petitioners are entitled to, among other things, "documents concerning air monitoring, dust levels, or any other environmental testing " (See Request No. 15.)

* * *

Petitioners continue to believe that, because the Operations Agreement between NYAR and Coastal relieves NYAR of liability for the acts or omissions of Coastal in connection with the operation of the facility, the Board can find that Coastal is not NYAR's agent or contract operator and is subject to preemption under ICCTA. If, however, the Board decides to look beyond the limitation of liability provisions of the Operations Agreement, it is respectfully submitted that, in addition to the reasons set forth in Petitioners' response to the motion for a protective order made by NYAR and Coastal, the motion should be denied because Jackson

demonstrates that the discovery Petitioners seek is relevant and could lead to the discovery of admissible evidence.

Respectfully submitted,

Fran M. Jacobs

Fran M. Jacobs

cc: Ronald Lane, Esq (by FedEx)
John F. McHugh, Esq. (by FedEx)
Howard M Miller, Esq. (by FedEx)
Mark A. Cuthbertson, Esq. (by FedEx)